Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

COMMENTS OF THE CITY OF ARLINGTON, TEXAS

The City of Arlington ("the City" or "Arlington") files these comments in response to the Second Further Notice of Proposed Rulemaking released on September 25, 2018 in the above entitled proceeding. In addition to these comments, the City endorses the comments submitted by the United States Conference of Mayors, the National League of Cities, the National Association of Telecommunications Officers and Administrators, the Texas Association of Telecommunications Officers and Administrators, and the Texas Coalition of Cities for Utility Issues.

I. Introduction

The City of Arlington fears that the Commission's proposals in this proceeding pose a threat to public, educational, and governmental (PEG) stations as well as to broadband connections provided to schools and libraries pursuant to local franchise agreements and relevant state law. PEG and educational connections have provided important benefits to Arlington and communities throughout the nation, helping ensure broad access to local government proceedings, providing a platform for important community communications, and helping ensure that all Americans have broadband access at schools and libraries.

Among the six purposes of the Cable Communications Act outlined by Congress, the City would point the Commission to the second and fourth purposes:

> *"(2) establish franchise procedures which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community...*
> *... (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public".*[1]

The City strongly believes that in-kind payments that support PEG channels and programming play a strong role in meeting those statutory purposes and that is why Congress allowed for in-kind payments and specifically outlined their use to support PEG and to meet other community information needs. Congressional intent in this area is further confirmed a few pages later by a clear statement of policy:

> *"It is the policy of Congress in this Act to (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media;"*[2]

Indeed, in an age of globalization and media consolidation, PEG channels are more important than ever to ensuring that cable customers have access to community information and to a wide array of local viewpoints.

In Arlington, the City collects a five percent franchise fee plus an additional one percent PEG fee to support public, educational, or government access facilities including PEG channel capacity, facilities and equipment. These fees are collected under the statewide franchise law, as found in Chapter 66 of the Texas Utilities Code. While Chapter 66 unnecessarily limited local control and capped local fees for in-kind services, we are now more than a decade into its regime and it is one that has worked well for Arlington. It allows the City to collect reasonable

[1] 47 USC 521
[2] 47 USC 521 note

compensation for the use of public rights-of-way and to fund public, educational, or government access facilities while also allowing access to new cable providers, which has improved consumer choice, service, and reliability. The system is working well in Texas and the City urges the Commission to proceed carefully in this matter, with an eye to the full implications of its decisions.

At the broadest level, the City views this Second Further Notice of Proposed Rulemaking as yet another Commission overreach. This overreach is compounded by the clear evidence that the Commission's action in this proceeding is a solution in search of a problem. For evidence, one need look no further than what has happened since March 5, 2007, when the Commission issued the first order in this proceeding outlining new regulations restricting local franchising authorities. That first order was followed by seven years of Commission inaction on petitions for reconsideration, then a 2015 rejection of reconsideration of the first order, and then another two years of litigation in which the Sixth Circuit Court of Appeals ordered the Commission back to the drawing board for a large portion of the regulation.

During that time, we have seen an explosion in telecommunications, video, and information services offerings and major increases in the speed and quality of those services. On March 5, 2007, consumers in most large, urban communities had one option for cable service, a situation that seems quaint a mere decade later. Nevertheless, this proceeding is largely based on the assumption that local franchising authorities operating under pre-2007 regulations present a major if not insurmountable obstacle to competition in the communications marketplace and to investments in communications infrastructure. Given the realities of the current marketplace, the City finds that assumption suspect at best, a suspicion exacerbated by the fact the previous decade's increases in consumer choice, quality, and speed have been most pronounced in large urban areas where cable franchising is most ubiquitous. In addition, these gains have been most pronounced

for cable customers, perhaps the communications mode most subject to local regulation and that pays the closest to fair market value for the use and management of valuable public property.

The City recognizes that the Commission cannot amend statutes. However, the City feels compelled to point out that the Communications Act provides a poor framework for regulating the modern communications industry. For evidence, one need look no further than the Sixth Circuit Court of Appeals decision in *Montgomery County, Maryland v. FCC* and the Commission's tortured attempts to cobble together different portions of the statute to address the Sixth Circuit's concerns while still meeting the Commission' goal of constraining local franchising authorities. Most consumers purchase some combination of video, telephone, and broadband from a cable company, a telephone company, or another provider, with little thought to whether that provider is a Title II carrier, a cable carrier, a provider of "information services", or some combination thereof.

The outdated statute also impacts local governments. Communications providers placement of facilities within public rights-of-way and public property impose similar occupation of limited space as well as burdensome impacts to cities and their citizens, regardless of whether those services are provided by a Title II carrier, a cable carrier, or a provider of "information services." Indeed, from the local government and local franchising authority perspective, the design of the statute has led to platform shopping among providers, with all of them seeking to define their service as the type that pays the least for use of valuable public property. It also leads to rent seeking and other anti-competitive, anti-consumer, and anti-public interest behavior. Providers falling under the sections of the statute with the lightest regulatory touch seek to keep competitors from similar classification and treatment while those falling under the purview of stricter portions of the statute seek to reclassify their service to escape regulation and minimize

right-of-way fees. These regulatory games also impact consumers, providing an incentive to providers to gain an edge on their competitors through favorable regulation rather than superior service.

Keeping with this theme and before addressing some of the Commission's specific questions, the City feels compelled to state the obvious: this Second Further Notice of Proposed Rulemaking comes at the same time that the Commission has granted companies deploying small cell 5G infrastructure, which will compete directly with traditional cable for video services, favorable (almost unimpeded and nearly cost-free!) access to public rights-of-way.

II. State Franchising Regulation (Paragraph 32 of Notice)

Although these questions are the last posed in the Second Further Notice of Proposed Rulemaking, the City responds to them first as the Commission's conclusions here pose the greatest threat to the City and its residents. As stated previously, the City of Arlington collects a five percent franchise fee plus an additional one percent PEG fee to support public, educational, or government access facilities including PEG channel capacity, facilities and equipment pursuant to Chapter 66 of the Texas Utilities Code and the Cable Communications Act.

A. ***Is there any statutory basis to maintain the distinction between state-level franchising actions and local franchising actions?***

Statewide franchising was rare when the statute was enacted, so it stands to reason that the statute does not go to great lengths to distinguish between state-level and local franchising. However, the City would argue that NCTA's assertion[3] that the Commission should expand this order to state-level franchises is not supported by the record in Texas.

[3] FCC *Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311*, Footnote 155

Chapter 66 of the Texas Utilities Code does indeed allow cities to collect a one percent PEG fee. However, as outlined above, this one percent fee helps communities meet important and clearly defined statutory goals and purposes. In addition, there is no evidence that the one percent fee has had an adverse impact on cable investment and consumer choice in Texas. On the contrary, in Arlington AT&T UVerse has entered the market in competition with our historic cable provider Time Warner Spectrum.

B. ***Do state-level franchising actions or state regulations governing the local franchise process today impede competition or discourage investment in infrastructure that can be used to provide services, including video, voice, and broadband Internet access service, to consumers?***

No. On the contrary, since the enactment of Chapter 66, Arlington consumers have a choice of two different cable provides, AT&T UVerse and Time Warner Spectrum.

III. Cable-Related, In-Kind Contributions (Paragraphs 16-31 of Notice)

A. Paragraph 16-18

In *Montgomery County*, the Sixth Circuit Court of Appeals found that the Commission's determination that the statute allows the Commission to treat "in-kind" services as franchise fees was not supported by an explanation:

> *"...the FCC has offered no explanation as to why Local Regulators' structural arguments are, as an interpretive matter, incorrect. And apart from a fleeting reference in the Reconsideration Order, the FCC has not even defined what "in-kind" means.*[4]

The City believes that the Commission has still not met that standard in this most recent proposal. Indeed, the Commission in this proposal does not adequately address a primary

[4] United States Court of Appeals for the Sixth Circuit, *Montgomery County, Maryland v. FCC*

contention raised by local franchising authorities in *Montgomery County* and supported by the Court: that treating cable-related in-kind fees *"would undermine various provisions of the Act that allow or even require the Local Regulators to impose cable-related obligations as part of their cable franchises."*[5] Instead, the Commission cites portions of the statute outlining franchise fees while continuing to ignore portions of the statute that impose obligations on local franchising authorities.

The City would add that the Commission takes a whole or nothing approach to the question of cable-related in-kind fees and those that are not cable related. The Commission argues that the statute does not allow it to make such a distinction. As outlined above, the City disagrees, given the obligations that the statute imposes on local franchising authorities related to the public. In addition, the City would note that nothing in the statute appears to prohibit the Commission from differentiating between cable-related in-kind fees and those that are not cable related. The City would argue that the Commission's failure to take this approach is part of a pattern: read statutes in a manner that most benefits the industry, at the expense of local governments, consumers, and the public.

Surely, the Commission could develop an interpretation of the statute that allows the Commission to address the issue of supposedly outrageous local franchising authority demands for in-kind fees not related to cable while preserving cable-related in-kind fees. On the issue of supposedly outrageous local franchising authority demands for in-kind fees that are not cable related, the City would remind the Commission that extreme examples usually make for poor policy. If ever a situation called for a compromise approach, this would certainly be it.

[5] United States Court of Appeals for the Sixth Circuit, *Montgomery County, Maryland v. FCC*

B. Paragraph 19

The City agrees with the Commission's conclusion that PEG capital costs required by the franchise are in-kind, cable-related contributions excluded from the five percent cap. The language in 47 USC 542(g)(2)(C) could not be any clearer:

> *"(2) the term "franchise fee" does not include-*
> *(C) in the case of any franchise after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."*[6]

C. Paragraph 20

As outlined in our comments regarding paragraphs 16-18, the City believes that the Commission is purposefully choosing to use a biased interpretation of the statute regarding cable-related in-kind fees. On this specific issue, the City would point out that the statute specifically separates fees related to the use of public, educational, and governmental channels from franchise fees:

> *"(c) Itemization of subscriber bills*
> *Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to Section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:*
> *(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which it is paid.*
> *(2) The amount of the total bill assesses to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.*
> *(3) The amount of any other fee, tax, assessment, charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.*[7]

[6] 47 USC 542
[7] 47 USC 542

Through this language, Congress clearly outlined a separation between franchise fees and cable-related in-kind fees. Combined with the obligations the statute imposes on local franchising authority, this language makes a strong case for leaving cable-related in-kind fees outside of the five percent franchise fee.

D. Paragraph 21

The City agrees that the cost of a build out requirement under a franchise should not be counted towards the five percent cap. As outlined above, the City believes that the statute requires the Commission to leave public, education, and governmental channel costs outside of the five percent franchise fee cap. The City also believes that institutional networks and other services to schools, libraries, and other community institutions provided as part of a franchise agreement should be excluded from the five percent cap.

E. Paragraph 22

The City of Arlington's franchising requirements under state law do not discourage new entrants into our cable market.

F. Paragraph 24

The City agrees that the cost of build out requirement under a franchise should not be counted towards the five percent cap. As outlined above, the City believes that the statute requires the Commission to leave PEG channel costs outside of the five percent cap. The City also believes that institutional networks and other services to schools, libraries, and other community institutions provided as part of a franchise agreement should be excluded from the five percent.

In Arlington, here are some of the ways the City's PEG channel benefits our community and how a loss or reduction in funding would hamper the education and engagement of our community:

- The City of Arlington airs 370 new, originally produced videos annually on the City's PEG channel. This programming is all educational, providing residents vital information about City services, events, meetings and emergencies. All equipment to produce these videos was made possible through the use of PEG funding.
- The City of Arlington opens its PEG-funded TV studio to partner agencies to assist them in messaging for community news and events with all of that programming also being aired on our PEG channel. The City's partners include: the Texas Department of Transportation, local school districts, the Chamber of Commerce, the University of Texas at Arlington, Tarrant County College, Arlington Museum of Art, Mission Arlington and the Levitt Pavilion. The creation of the City's TV studio was only possible through the use of PEG funding.
- All of the programming created by the City for use on Arlington's PEG channel is also multi-purposed to also air on social media channels and the City's website. This allows the City to further the reach of the PEG-funded content and reach an even larger audience. As an example, in FY2018 PEG-funded videos were viewed **3,381,966 times** on the City's YouTube channel (6,579,219 minutes, 109,653 hours). 225,494 minutes of PEG-funded video content was viewed on the City's Facebook page in FY2018, up 155% from the previous fiscal year. That same video content received **668,406** total video views.
- The City also airs live and tape-delayed broadcasts of Arlington City Council and Arlington Planning and Zoning meetings, providing transparency for city business. The broadcast of these public meetings provides access to our residents who are unable to attend those meetings. All of the audio-visual equipment in our Council Briefing Room and City Council Chamber was funded through the City's PEG account.

- Without PEG funding, the City of Arlington would lose opportunities to make upgrades/repairs to the City's TV studio, which is utilized for multiple PSAs, news programs, community events and educational partnerships with local school districts.
- The loss or reduction of PEG funding will severely limit Arlington's ability to make repairs and upgrades to field equipment used to provide vital video programming to its residents.

CONCLUSION

The City urges the Commission to give thoughtful consideration to the City's comments as well as those comments submitted by the United States Conference of Mayors, the National League of Cities, the National Association of Telecommunications Officers and Administrators, the Texas Association of Telecommunications Officers and Administrators, and the Texas Coalition of Cities for Utility Issues.

Respectfully submitted,

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